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June 21, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

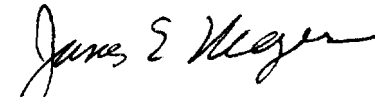
Re: MM Docket No. 92-266

Dear Ms. Searcy:

On behalf of Encore Media Corporation, enclosed are an original and nine copies of its Petition for Reconsideration and Clarification in the above-captioned proceeding.

Should additional information be necessary in connection with this matter, please communicate with this office.

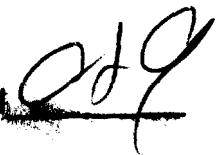
Very truly yours,



James E. Meyers
Counsel for
ENCORE MEDIA CORPORATION

Enclosures

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Before the
Federal Communications Commission
Washington, D.C. 20554

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JUN 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Rate Regulation)

MM Docket No. 92-266

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Encore Media Corporation ("Encore Corp.") through undersigned counsel and pursuant to Section 1.429 of the Federal Communications Commission's ("Commission" or "FCC") rules (47 C.F.R. §1.429), petitions the Commission for reconsideration and clarification of its cable rate regulation Report and Order in MM Docket 92-266 (FCC 93-177 released May 3, 1993) ("Report and Order").¹ Encore Corp. is the owner of the video programming service ENCORE which is almost always offered over cable television systems to subscribers both on a stand-alone premium (per channel) basis and as part of a package of per channel offerings or as part of a cable programming service tier. ENCORE has been offered as a "premium" video programming service since its 1991 inauguration. Encore Corp., a commenter in the rulemaking proceeding, is an interested person with standing to hereby petition.

- I. **The Commission Should Allow Cable Operators Flexibility to Apply Permitted Per Channel Rates Across Cable Programming Service Tiers on a "Weighted Average" Basis**

¹58 Fed. Reg. 29736 (May 21, 1993).

A. The Legislative History Reflects a Congressional Desire For unbundling of Programming to Give Consumers More Options, and Bite-Sized Tiers Achieve that Goal

A primary policy of the 1992 Cable Act ("Cable Act" or "Act"), as stated by the Senate, is to ensure that cable operators continue to expand the programs offered over their cable systems in an effort to give subscribers more choices and to foster competition.² Congress indicated that operators' unbundling video programming services, from regulated tiers to per channel, per program offerings, was a significant step in this direction.³ Moreover, the Act's rate regulation provisions, which pronounce video programming services offered on a per channel, per program basis as un-regulated, is clear indication that Congress wants the cable industry to move towards a la carte offerings.⁴ "Bite Size" tiers (3-6 channels) for around \$4.00 instead of 20-channel tiers is a natural interim step toward a la carte offerings.

B. The Industry Trend Toward Offering Bite-Sized Tiers should be promoted

As the Senate recognized, "only about one quarter of all cable systems are addressable, having the technology" to go a la carte in the near future.⁵ As it will take time for most of the industry to become substantially a la carte, the current

²Cable Act, §2(b)(3); Conference Report, p. 58. The Conferees adopted the Senate Statement of Policy.

³E.g., Senate Report, p. 77.

⁴Sec. 543(b), (c), (1)(2); House Report, p. 79.

⁵Senate Report, p. 77.

industry trend toward offering bite-sized tiers, becomes increasingly critical. Many operators are moving toward creating "bite-size" tiers which introduce several newly launched cable services together with a "locomotive" service such as ENCORE. See Exhibit "A". These tiers offer 4-6 channels with a moderate retail price between \$2.95 and \$4.95. As recognized in the legislative history, bundling of program offerings is sometimes necessary to "nurture certain offerings or help market them by exposing them to more subscribers."⁶ "Locomotive" service(s), like ENCORE, are needed to increase consumer acceptance of these new tiers of program services and thus provide them with an opportunity to develop, grow and become viable program options for consumers.

C. Weighted Averaging Does Not Require the Commission to Make A Conceptual Departure From Its Tier Neutral Approach

in high quality, services which often have a higher cost particularly those like ENCORE, which do not receive advertising revenues and thus require a higher license fee to the cable operator.

Through the Report & Order's benchmark discussion, we believe that the Commission was sympathetic to the fact that all programming is not the same, but did not wish to delve into content regulation. However, in an effort to strike a balance between the desire for a non-confiscatory rate regulation, administrative simplicity and the dis-incentive to operators to strip programming from basic service tier, the Commission, in its Report & Order, chose a universal benchmark for both the basic service tier and for cable programming service. Encore Corp. fully accepts the Commission's universal benchmark as an administratively sound method of determining maximum permissible per channel rates ("PERCH Rate"). However, by arbitrarily requiring operators to mechanically apply the resulting PERCH Rate uniformly across all CPS tiers, we believe that the Commission's benchmark train, which heads in the right direction, takes a critical detour which is likely to derail the underpinnings of the uniform-application approach.

D. Uniform Application Approach has Several Unintended Negative Effects

Commission Form 393 (Worksheet #1), which is the operator's initial form for calculation of his PERCH Rate uses "Weighted Averaging". According to the instructions for Worksheet One, a cable operator must determine the PERCH Rate for his system by

weighting the per channel rate for each tier "according to the number of subscribers to that tier." FCC Public Notice, Revised FCC Form 393: Part II (May 19, 1993). Resultingly, more expensive PERCH Rate CPS tiers which generally are subscribed with less penetration than lower PERCH Rate tiers are weighted less in deriving the average PERCH Rate for the whole system. By this method the Commission equitably allows operators to account for more expensive programming. However, after the operator uses this benchmark rate to determine his PERCH Rate, the Commission requires him to disregard the concept of weighted averages used up to this point, and to mechanically apply his PERCH Rate uniformly across all tiers.⁸

1. **Chilling Effect on Trend Towards
Offering Bite-Sized Tiers**

A uniform PERCH Rate application ("tier-neutral") approach has the unintended effect of chilling operators incentive toward offering bite-sized tiers. For example, an operator with a BST of 20 channels, at \$10.00 (100% penetration); a CPS1 of 20 channels, at \$11.00 (90% penetration) and a CPS2 of five channels, at \$5.00 (30% penetration) would have no incentive under the tier-neutral approach to retain the separate CPS2 tier. He would do better to combine the CPS1 and CPS2 tiers and increase the overall rate. This would result in 90% of the subscribers (i.e., the current CPS1 subscriber universe) receiving a price increase for services they may not want (i.e.,

⁸See Report & Order at para. 215, fn. 541.

the current CPS2 services). Moreover, more expensive locomotive

services like MWCONE would be detached from the system in the

tiers does not exceed the PERCH Rate. In this manner, a cable operator may reduce one regulated service tier rate (e.g., CPS1) to a level below the maximum permitted rate for that tier and apply the difference (i.e., the amount saved to the subscriber) to a different regulated service tier (e.g., CPS2). Being able to borrow from the PERCH Rate on one tier to support the cost of more expensive programming on another tier will allow cable operators flexibility in sizing and programming their regulated CPS tiers, as well as the ability and incentive to arrange rates in a manner which eliminates the unintended cross-tier subsidies.

**1. Weighted Averages Allow Operators
Flexibility to Assess Costs Where Appropriate**

Different CPS tier rates would have a pro-subscriber effect. Savings from larger tiers of cable programming service may be applied to smaller tiers of cable programming service which contain higher priced/value programming. Consumers would be able to purchase each level of service for a price that more closely approximates the cost of the respective service tier. Lower cost CPS tiers would be entitled to lower rates whereas higher cost CPS tiers would merely be priced more in line with the value of their service. As we recognize that the Commission has no desire to regulate content nor to categorize services based on their purported economic value, Encore Corp. notes that this approach does not require any FCC characterization of programming, but rather merely puts such necessary flexibility

in the hands of those best able to make such determinations, the cable operators.

2. Weighted Averaging Will Not Incent Operators to Strip Channels from BST

The Commission states in its Report & Order an intent to "avoid creating incentives that could reduce the number of services on the basic tier." Report & Order, at para. 197. As Encore Corp. is requesting only that operators be allowed to apply Weighted Averages across CPS tiers, and because operators must continue to apply a strict PERCH Rate to the BST, there is no incentive under a weighted average approach to strip channels from BST. Moreover, cable operators that utilize weighted average PERCH Rates accept the risk that lower tier subscribers whose rates are reduced may not choose to take higher tiers whose rates are correspondingly increased.

3. Weighted Averaging is Administratively Uncomplicated and should be Permitted Without Requiring Rate Approval

The weighted averaging approach Encore Corp. recommends involves merely permitting the cable operator to adjust its PERCH Rate Worksheet 1: Line 600 from channel to channel across CPS tiers so long as the total rate for regulated services is the same as the cable operator would be required to charge under the Commission's tier-neutral approach. In addition to fulfilling the Act's programming goals, this additional flexibility will lessen need for cable operators to undertake costly and administratively cumbersome cost of service showings.

II. The Commission Should Clarify That Per Channel, Per Program

Services May be Packaged With Equipment

Both the statutory and regulatory language are clear that per channel, per program offerings ("PCPP") are unregulated. The Commission's regulations also are clear that equipment, used to receive basic service, must be unbundled and priced at actual cost. Neither the statute nor the Report & Order precisely define "unbundled." We interpret the term "unbundled" with respect to equipment to mean that equipment must always be available to subscribers on a stand alone, regulated and priced at cost, basis, consistent with Section 76.923 of the regulations.

For marketing and promotional purposes, cable operators may wish to package unregulated PCPP service offerings (such as ENCORE) with equipment for added value. We believe the attribution of an allocated equipment charge within the package is moot since the PCPP rate is not subject to regulation. Accordingly, Encore Corp. seeks clarification that programming offered on a PCPP basis may be marketed and offered with various equipment (e.g., remotes, converters, etc.) in an unregulated discounted package, so long as the respective equipment is also available on an unbundled, and regulated, basis consistent with the regulations. Specifically we seek clarification that such offerings are allowed under two scenarios: First, where a PCPP service is available only packaged with certain equipment, although the equipment is available on an unbundled, at cost, regulated basis; Second, where a PCPP service is packaged with

equipment, but each package component is available individually and the package price is equal or less than the sum of the package component prices.

III. Conclusion

In light of the above, Encore Corp. requests that the Commission take the following actions. First, we request that the Commission reconsider its rate regulation Report & Order to allow cable operators the option of applying the maximum permitted per channel rate, derived from FCC Form 393: line 600, across all CPS tiers on a "Weighted Average" basis, so long as the total rate for regulated services does not exceed the permitted rate per channel. Correspondingly, we ask that the Commission, in granting such reconsideration, make clear that rate adjustments made on the weighted average basis do not require government approval. Second, we request that the Commission clarify that its Report & Order allows programming offered on a per channel or per program basis to be packaged with equipment on an unregulated basis, so long as the equipment is available on an unbundled, regulated, at cost basis.

Respectfully submitted,
ENCORE MEDIA CORPORATION

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By James E. Meyers
James E. Meyers
Its Attorney

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ATTACHMENT A

MARKETING

Tier-ful Surprise

Some operators say Encore helping to drive program packages

BY K.C. NEEL

Encore — which was launched in 1991 as the “glue” that would hold pay TV packages together — is taking another tack in the post-reregulation era: basic cable tiers.

“We think the future is best suited for tiers and we can help operators with new services and help drive sales. For those

ENCORE

people who are going to add new services, they’ll probably do it in tiers,” said vice president of marketing Warren Zeller.

Case in point: Inland Cable Communications in Attleboro, Mass., began March 1 to sell a four-network tier that includes Encore for \$2.95. In two days, the tier had a 10.5-percent penetration rate, thanks largely to Encore’s appeal, according to Donald Charlebois, the sales marketing manager at the Continental-owned system which counts 12,600 customers.

“Encore is definitely the main appeal of the tier,” he said.

Likewise, in North Adams, Mass., Berkshire Cablevision — an Adelphia Communications system — is selling Encore in a package of five other basic services for \$5.50 a month; the sell-in rate stands at 40 percent.

“The anchor of our tier is Encore,” said Ron Rup, the system’s regional sales manager. “We used to have Discovery in the tier, but moved it down to the tier below it and we needed something that would draw people to this tier. Encore was that draw.”

Berkshire Cablevision offers three tiers of service:

- A broadcast basic package of 17 off-air signals for \$9.95.

- An “economy basic” package of another 13 satellite-delivered networks, including The Discovery Channel and The Learning Channel, plus the broadcast signals for \$19.95.

- The “standard” tier which offers Encore, VH-1, The Family Channel, Nostalgia Network, Country Music Television, Bravo and E! Entertainment Television for \$5.50 a month. Customers subscribing to the standard tier also receive a remote control and access to pay-per-view.

Rup, noting that tiers have been in place

since his system was rebuilt last summer, said Berkshire may add the Sci-Fi Channel to the Encore package later this year.

Just under half the customers who have been offered the standard tier have taken it, according to Rup. The only marketing effort has been a door-to-door sales campaign in areas that have been rebuilt and can receive the tier, he added.

So far, about three-quarters of Berkshire’s 13,500 customers have been offered the new tier featuring Encore.

Across the state in Attleboro, Inland Cable created a four-tier set-up March 1. The broadcast basic package — which no one has subscribed to solely, according to Charlebois — includes five broadcast services, QVC, Home Shopping Network, a locally produced news channel and municipal and school channels for \$8 a month.

Basic service

Full cable service is a 30-channel, \$18.40 package that includes the broadcast basic service, some Boston off-air stations, The Family Channel, Nickelodeon, Arts & Entertainment, Headline News, CNBC, The Weather Channel, The Nashville Network and C-SPAN services, among others.

For \$20.25, customers receive the first two tiers, plus another 10 satellite-delivered networks, including CNN, MTV and New England News Channel.

The last tier, which consumers aren’t required to buy through to receive, costs

\$2.95 and includes the system’s newly launched services: Encore, Cartoon Network, Sci-Fi Channel and Court Television.

After the tier had been available for two days, Charlebois said Inland had “many people calling up and asking for the ‘Encore package.’”

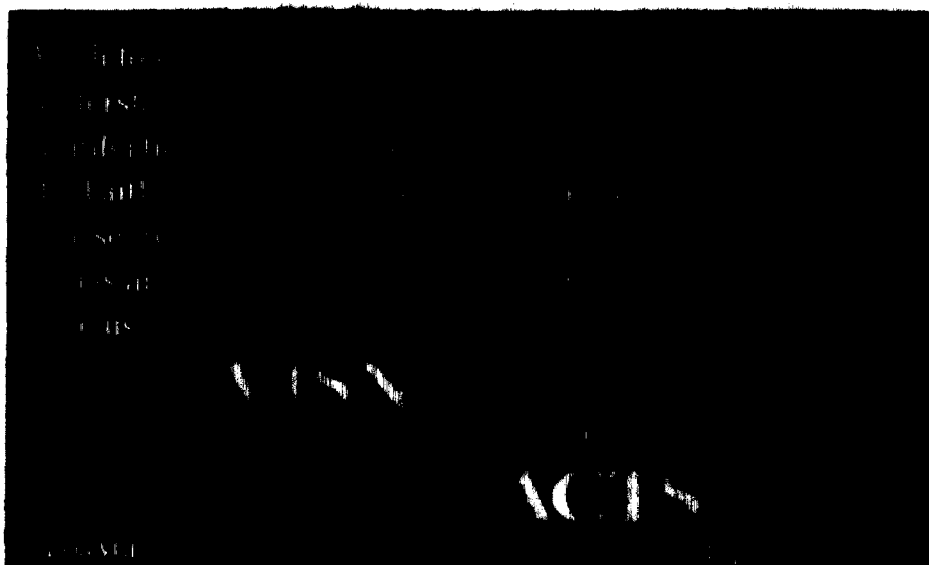
Rup said the tier has helped drive sales, even though he’d like to see a bigger customer buy-in rate: “We have a wide range of demographics here, from affluent customers to very depressed areas. We’ve tried to appeal to everyone and tiering helps.”

So far, the system has only marketed the tier door to door, but plans to broaden its sales efforts when the rebuild is done. However, he’s not expecting to add big numbers in an economy that’s still soft.

Charlebois expects Encore to hit a 30-percent penetration rate by year’s end, even though Attleboro is grappling with the same economic problems North Adams is. Still, he said the system wants to capitalize on the fact that its customers like the idea of paying for only what they want to watch.

“When we started the tiers, we did two questionnaires asking them whether they supported the idea of separate tiers,” he said. “We had considered adding these networks (Encore, Cartoon, Court TV and Sci-Fi Channel) to the \$20.25 tier and raise rates.

“But we received an overwhelming ‘yes’ to the idea of another tier.”



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NEWCHANNELS INTRODUCES TTV

By ROD GRANGER

NewChannels Corp. last week introduced
TTV, an original tiering structure com-
prised of newer basic services, into two
of its upstate New York systems, in Syra-
cuse and Binghamton.

Launched Oct. 8, TTV — or Tier Television —
may eventually be
rolled out to other
NewChannels systems,
depending on its per-
formance in New York,

TV and Sci-Fi.

NewChannels launched its first tier — containing
primarily regional sports networks and American
Movie Classics — “years ago,” Kirkwood said, call-
ing it a “remote tier.”

The company is now “working backwards,” he
said, in that NewChannels’ original tier has been re-
named TTV1, while the
current tier is TTV2.
Plans are in place to
launch TTV3 sometime
in 1993, although what

NewChannels Debuts TTV

CONTINUED FROM PAGE 3

pay \$6.

It's too early to have seen preliminary figures, but Kirkwood feels confident that people will be amenable to paying these prices to get their TTV.

NewChannels did not do any market research specifically geared towards eliciting consumer attitudes, Kirkwood said, but instead knew the rates would be popular "from prior experience" and from the types of services included.

For example, "customers were shouting for Cartoon and Sci-Fi," he said.

Terry Brennan marketing

**NewChannels used
an offbeat market-**

and not identifying it as a cable-related product. "It [the campaign] generated a lot of response from the marketplace," Kirkwood said.

"We had fun with it, and used humor to create curiosity with the letter 'T,' Brennan explained. Among the teaser ads were pictures of a tea bag and a golf tee, each stating, "This is not T."

The teaser campaign, including radio, newspaper and broadcast elements, ran for a week prior to launch, and "radio stations got pounded with mail" asking what the ads meant, Brennan said.

On Oct. 8 — "T-Day" — ads explaining Tier Television were introduced, as was a free preview.

American Charge

CONTINUED FROM PAGE 3

"The possibility for Playboy to enter in a way that was only a dream five or of direct-to-home viewers in Europe base, and a lot of people are looking for nets."

He expects to make definitive plans. Networks party here last Wednesday to a higher profile on the international scene, plovtz said, "We've had calls [about it] everywhere. We definitely have plan

In particular, she sees Southeast Asia places for new investments. USA has

CTAM '92

HBO/Showtime: Act II

Operators applaud deal, but can't yet gauge marketing efforts' impact

BY MATT STUMP

The fact that Showtime and HBO will jointly conduct five multipremium marketing campaigns next year won solid reviews from cable industry executives attending last week's CTAM '92 conference in San Francisco. But many admitted that they can't yet say how much impact the effort will have on pay TV's bottom line.

The fact that the two programmers will develop the six-week campaigns was one of the major agreements born from the Viacom International/Time Warner Inc. decision to end to their three-year-long, \$2.4 billion legal battle.

Gone are the time-lock campaigns that prompted Viacom to file the anti-trust lawsuit in 1989 that charged HBO with "locking up" operators' marketing plans. That, Viacom had charged, effectively kept Showtime and The Movie Channel from marketing their services for a good portion of the year.

Operators last week said they won't miss the time locks, which they noted generated a large amount of connect and disconnect activity, but little unit gains at the end of the year. The new joint campaigns are scheduled for January, April, July, September and November.

"It's very beneficial to the operator," said Seth Morrison, Viacom Cable's programming director. "We have committed to a lot of packaging, and the time locks have hurt us because the rest of the year

still reserve the right to do what's in the company's best interests."

During each campaign, operators will decide which offers they'll use; HBO and Showtime will create the generic marketing material. Operators also will be able to customize the marketing package's elements, although they'll have to cover that cost themselves.

Encore's reaction to the prospect of facing the HBO-Showtime marketing ef-

forts was guarded.

Asked if Encore will be included in the campaigns, its chairman, John Sie, said, "We don't know enough yet."

"(As a former operator) I am a little leery when someone else controls the creative process," he said. "From an operator's point of view, you don't want to limit your options."

See HBO on page 20



Basic Nets Position Themselves for PPV

By KIM MITCHELL

Whether they are positioning themselves as promoters or programmers of pay-per-view product, basic cable networks are eagerly looking at the category as a way to diversify.

In a nutshell, here's how some basic cable players are looking at the PPV category:

Bravo will seek to take an active role in PPV programming in the future, said Charlotte Van Doren, assistant director of acquisitions for Bravo. She added that NBC and Cablevision Systems Corp.'s 10-year PPV deal with New York's Metropolitan Opera opens up a variety of promotional and programming opportunities for Bravo to embark on the PPV side.

Bravo will air NBC and Cablevision's September PPV special

small one, for country music," said Lloyd Werner, senior vice president of sales and marketing for Group W Satellite Communications, the network's marketer and distributor.

With country music sizzling across the charts, competition from broadcast networks such as NBC — which reportedly paid singer Garth Brooks \$1 million for his re-

cent music special — promises to intensify. Another hurdle is TNN's need to re-educate country talent managers, who fear that overexposure of an artist through PPV would result in the cannibalization of concert sales.

"It won't be a multimillion [dollar] business for us," Werner said. "But I think that if anyone's going to supply country music on a PPV

basis, it should be us."

Discovery Networks was one of the first basic cable network groups to zero in on potential PPV revenues. Discovery Select will offer eight documentaries priced at an average of 80 cents per buy as Tele-Communications Inc.'s Impulse PPV test in suburban Denver, part of its Viewer-Controlled Television test.

Other networks do not plan to enter the PPV arena as programmers, but will seek to tie programming into PPV events.

For example, E! Entertainment Television recently positioned an episode of *Extreme Closeup* as something cable operators could schedule alongside The Judds' December 1991 PPV concert, which was produced by Showtime. ■

Cable networks see promotional and revenue opportunities in PPV.

from the Met in its entirety, Van Doren said. "There are some very interesting opportunities for a basic channel to be involved with PPV this year," she said.

MTV: Music Television thinks so too. The network is taking the PPV plunge in a big way on June 6, when it and Polygram Diversified Entertainment co-sponsor a Guns N' Roses concert. The three-hour \$24.95 concert, presented from Paris, will mark the network's first foray as a PPV programmer.

MTV will provide promotional support for the network, by highlighting the band's videos, and through on-air advertising and promotion by VJs. The network is looking for "well over a 1 percent buy-rate," said Sara Levinson, executive vice president of MTV.

If the concert is a success, the network is likely to pursue more such ventures. "We'd like to see it on a regular basis," she said.

CNBC plans to launch its first foray into PPV in 1993. Not surprisingly, the planned topic is financial and the tone instructional. The event will be aimed at the more sophisticated investor and as a result, pricing is likely to be on the high end, said CNBC president Al Barber.

"We are clearly positioned to make an event happen and make it happen successfully," said Barber, who added that he would like to see the network produce four such events per year, perhaps co-sponsored. These events could range from the basics to the most sophisticated investment approaches. CNBC, which already has offered seminars and home videos on such topics, sees PPV as a natural extension of its position, Barber said.

The Nashville Network also is casting an eye toward PPV. "We think there is a market, albeit a

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THAT NETWORK IS



AND ONLY ONE COMPANY OFFERS BOTH.



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